IN THE

Supreme Court of the United States

October Term, 1954.

No. 21.

RAY BROOKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR THE PETITIONER.

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Opinions Below.

The order of the National Labor Relations Board [R. 24-27] was issued on April 1, 1952, and is reported in 98 N. L. R. B. 976. The opinion of the Court of Appeals [R. 66-84] is reported in 204 F. 2d 899.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 14, 1953 [R. 85-88]. A petition for rehearing filed on June 2, 1953 was denied on December 16, 1953 [R. 89]. The petition for writ of certiorari was filed January 15, 1954 and was granted March 8, 1954. The jurisdiction of this Court rests on 28 U. S. C., Section 1251(1).

Question Presented.

Whether an employer is required to continue to bargain with a union whose authority to represent his employees has been revoked by a majority of the employees represented by the union, without any unfair labor practice on the employer's part.

Statute Involved.

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 1-5.

Statement.

On April 12, 1951, the Board conducted an election among Petitioner's employees. This election resulted in a majority of the employees voting for the Union. On April 19, 1951, Petitioner received in the mail a document reading:

> "We, the undersigned majority of the employees of Ray Brooks, Chrysler Plymouth Dealer, 6530 Van Nuys Blvd., Van Nuys, Calif., are not in favor of being represented by Union Local No. 727 as a bargaining agent.
>
> "We respectfully submit this petition for your consideration."

This document was signed by nine of the fifteen employees of Petitioner in the collective bargaining unit found appropriate by the Board. A duplicate of this document was, on or about the same date, received by the Union [R. 10].

On April 27, 1951, a representative of the Union wrote Petitioner and requested a meeting for the purpose of negotiating a contract [R. 16]. On May 1, 1951, Petitioner, by his counsel, sent the following reply to the Union:

> "Your letter of April 27 addressed to Mr. Ray Brooks has been forwarded to us. Both Mr. Brooks and we have been given to understand that the majority of the employees of Ray Brooks have repudiated the union and no longer wish to be represented by it.
>
> "A recent decision of the United States Court of Appeals for the Sixth Circuit held in a similar situation that it would be improper to compel the employees to be represented by a discredited union and that to force them to bargain through a representative which they had repudiated would be depriving them of their rights to bargain through a representative of their choice.
>
> "Under the circumstances wouldn't it be wiser to defer the consideration of the proposed negotiations until such time as it might appear that the employees desired to have your union represent them?"

The Union made no reply to this letter [R. 41-42, 17].

The Board, after the usual proceedings issued a decision and order in which it found that the Petitioner had engaged in interference, restraint and coercion of its employees in violation of Section 8(a)(1) of the Act, and had refused to bargain collectively with the Union as the exclusive representative of the Petitioner's employees in violation of Section 8(a)(5) of the Act. The Court of Appeals granted a decree of enforcement of the Board's Order [R. 85].

Specification of Errors to Be Urged.

The Court below erred:

1. In failing to hold that at any time employees may revoke the authority of a labor organization to represent them as their bargaining representative.

2. In ruling that a Board certification of bargaining representatives prevents employees from revoking the authority of a labor organization to represent the employees "for a reasonable period" after the certification.

3. In ruling that Petitioner was required to continue to bargain with the Union as the bargaining representative of his employees, despite the fact that a majority of the employees, without any unfair labor practice on the part of Petitioner, had revoked the authority of the Union to represent them as their bargaining representative.

4. In enforcing the Board's order.

Summary of Argument.

A union has no rights independent of the employees who chose the union as their representative for the purposes of collective bargaining. The union is only an agent of the group of employees which it represents. It is a well established common law principle of agency that when an agency is not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal as long as it is unexecuted. It is equally well settled that statutes in derogation of the common law are to be strictly construed. The National Labor Relations Act in no place provides, or even implies, that the statute in any wise limits the common law rule with respect to the revocation of an agent's authority by his

principal. In fact, that statute specifically provides that employees shall have the right to be represented by representatives of their own choosing and also gives to employees the right to refrain from collective bargaining. Accordingly, it is clear that the National Labor Relations Act, instead of restricting the common law right of employees to revoke the authority of their agent, reaffirms that common law right.

Argument.

> "A bargaining agent, under the National Labor Relations Act . . . is but an agent for a principal and not an independent contractor. His principal is the entire group of employees whom the agent represents. This is made clear by Section 7 of the National Labor Relations Act, which assures to employees the right 'to bargain collectively through representatives of their own choosing.' The important word in this connection is the word 'representatives.' The bargaining agent is a representative, not an independent contractor. He is clothed with all the rights of a representative, but is subject to all the fiduciary obligations of a representative." (*Graham v. Southern Railway Co.* (D. C. D. C.), 74 Fed. Supp. 663.)

Thus, a union has no rights independent of the employees who chose the union as their representative for the purposes of collective bargaining. The union is simply an agent which is subordinate to its principal.

It is a well established common law principle that when an agency is not coupled with an interest in the subject of the agency, it may be effectively revoked at the will of the principal so long as it is unexecuted. (2 Am. Jur. 37, and cases cited therein; Restatement of Law of Agency,

Sec. 118; Civ. Code of Calif., Sec. 2356.) Thus, since the authority of a union as the collective bargaining representative of a group of employees owes its existence to a majority of that group of employees, that authority may be terminated by express revocation by a majority of that group of employees, absent unfair labor practices inducing the revocation. As Mr. Justice Rutledge stated in his dissenting opinion in *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678, 696-697:

> "Unless a designated union acquires by its selection, a thraldom over the men who designate it, analogous to the power acquired by one who has a 'power coupled with an interest,' unbreakable and irrevocable by him who gave it, it would seem that any powers that it may acquire by virtue of the designation would end whenever those who conferred them and on whose behalf they are to be exercised take them back of their own accord into their own hands and exercise them for themselves . . . I do not think Congress intended, by this legislation to create rights in unions overriding those of the employees they represent. Nor did it require a special form or mode for ending a collective agency any more than for creating it. *What Congress did was to give the designated union the exclusive right to bargain collectively as long as, and only as long as, a majority of the employees of the unit consent to its doing so.*" (Italics ours.)

The majority opinion of this Court in the *Medo Photo Supply Corp.* case, *supra*, has been cited by the Board in support of its view that an employer is obligated to bargain with a certified union for a reasonable period of time which is normally one year. However, this Court did

not pass upon the duration of certification question in that case. This Court stated (321 U. S. at pp. 684-685):

> "There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, *if at all*, or the formalities, if any, necessary for such a revocation." (Italics ours.)

The decision of this Court in *Frank Bros. v. N. L. R. B.*, 321 U. S. 702, is also cited by the Board as upholding its doctrine. However, that case is not relevant here since in that case the union lost its majority after the employer wrongfully had refused to bargain with it. Further, as in the *Medo Photo Supply Co.*, case, *supra*, no attempt was made by the employees to revoke the union's authority.

It is well settled that statutes in derogation of the common law are to be strictly construed (50 Am. Jur. 340-341, and cases cited therein). The National Labor Relations Act in no place provides, or even implies, that the common law rule with respect to the revocation of an agent's authority by his principal has in any wise been limited. In fact, the express provisions of that Act support a contrary result. Thus, the Act in its declaration of policy states that the purpose of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." If the employees are not free to revoke the authority of a union to represent them, that union could negotiate a contract with the employer on behalf of the employees it purports to represent. In that

event, we would have a situation where the employees would be required to work under terms and conditions of employment fixed by a representative who not only is not of their own choosing but whom they have expressly rejected. As the Third Circuit stated in *National Labor Relations Board v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 70:

> "Such a situation would be intolerable no doubt to the employees, and certainly not conducive to the industrial repose sought by the Act. It would be in express violation of their lawful right under the Act to bargain collectively through a representative of their own choosing and to enjoy 'full freedom of association, self-organization and designation of representatives.' It is regrettable that in dealing with this situation the Board appears to have focused its attention solely upon the relationship, under the asserted one-year rule, between the employer and the certified union, and to have been oblivious of the lawful rights and interests of the vitally concerned employees. The conclusion is inescapable that the Board overlooked the salient consideration that the *National Labor Relations Act was designated by the Congress to serve as a shield and not as a shackle* to the millions of our employed whose welfare is the proper subject of national concern." (Italics ours.)

This principle was also succinctly stated by the Sixth Circuit in *National Labor Relations Board v. Vulcan Forging Co.*, 188 F. 2d 927, where the Court stated at (p. 931):

> "They (the employees) are entitled by law to bargain collectively through a representative of their own choosing. To force them to bargain through a representative which they had repudiated would be depriving them of their right to bargain through a representative of their choice."

Common sense and the language of the Act itself support the conclusion that the Act has not taken from employees the right to decide for themselves when the right to represent them, which they have given to a union, is to be revoked. The only possible reason for a contrary view is one of administrative convenience. Such a rule of administrative convenience would make the rights of employees subservient to the convenience of the very government agency which has been created to protect those rights.

The Board has contended that the legislative history of Section 9(c)(3) of the Act, which prohibits the Board from holding more than one valid election in a bargaining unit in a twelve-month period, supports its view with respect to the ability of employees to revoke the authority of a Board certified union to represent them. However, this provision of the Act relates only to the holding of elections by the Board and in no wise proscribes the right of employees to revoke the authority of their bargaining agent. "The province of construction lies wholly within the domain of ambiguity" (*Hamilton v. Rathbone*, 175 U. S. 414, 419, 421). As Mr. Chief Justice Taft stated in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563:

> "Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. (Citing case.) But when, taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this cannot control the interpretation. (Citing cases.) Such aids are only admissible to resolve doubt and not to create it."

The language of the Act is clear. If the Congress wished to limit the right of employees to revoke the authority of their bargaining agent, it would have so provided. The Congress instead chose only to limit the right of the Board to hold elections. In any event, the legislative history of the change in the Act dealing with the holding of elections by the Board is not a support of past practices of the Board, but rather a rebuke against a practice of repetitious elections, at the request of unions after they had lost elections. The Board practice, before the amendment to the Act, was to permit a new election, regardless of the time which had elapsed since the last election, upon the mere showing that the union had obtained additional authorization signatures. (S. Rept. No. 105, 80th Cong., 1st Sess. 12, 25.) The change in the statute was never intended to deprive the employees of the right to oust an unwanted bargaining agent, but was intended to curtail the favoritism which the Board was affording unions upon their loss of elections. (Senator Ball, 93 Cong. Rec. 7683.) This is especially true in light of the amendment to the Act adopted by the Congress at the same time which guarantees to employees the right to refrain from any or all organizational activities. (29 U. S. C., Sec. 157.)

This same contention was effectively disposed of by the Third Circuit in the *Globe Automatic Sprinkler* case, *supra*, where it stated (199 F. 2d at p. 68):

> "As to the asserted Congressional approval of the one year rule, it is well settled that Congress could not be presumed to adopt an administrative construction unless it is clear, uniform and consistent and there exists 'the precise conditions passed on prior to

the re-enactment.' *U. S. v. Missouri Pacific Railroad Company*, 278 U. S. 269, 280 (1929). The same principle applies with respect to the courts. 'The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons.' *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); see also *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939)."

The Board has also advanced the argument that its rule with regard to the revocation of a union's authority is necessary to avoid industrial chaos and to preserve the stability of employer-employee relations. This rationale of the rule is absurd when an attempt is made to apply it to the fifteen employees involved in the instant case. In any event, requiring a group of employees to be represented by a bargaining agent whom they have rejected would tend to promote rather than to prevent industrial chaos. No person takes kindly to an agreement entered into on his behalf by a representative whom he has rejected.

Chief Judge McCallister of the Sixth Circuit effectively disposed of this argument in *N. L. R. B. v. Mid-Continent Petroleum Corporation*, 204 F. 2d 613, *cert. den.*, 346 U. S. 856, where he stated at (204 F. 2d at p. 622):

"Nor do we find ourselves in agreement with the proposition that the application of the ordinary rules of agency would make chaos out of the administration of the statute and prevent the protection of the rights it was aimed to secure. If employees desire to dismiss their bargaining agent and bargain directly with their employer, they may be wise or they may be foolish. But, as Mr. Justice Rutledge observed in *Medo Photo* . . . 'It is not impossible for men

to want wage increases and also to remain or become nonunion men at the same time.' Elections or designations of bargaining agents and their subsequent repudiation may not make for an orderly fashion of procedure in the world of administrative agencies. But the statute, in its provisions that employees shall have the right to be represented by agents of their own choosing, provides a democratic process, and the fact that the exercise of democratic processes in other ways, may not fit in neatly with the scheme of administrative procedure is no reason, in law, for suspending, through administrative fiat, the exercise of such choice for a period of a year, in order that the problems of employees can be worked out by the Board in what it deems an orderly fashion, whether they like it or not."

The Board has also argued that its rule follows the principle inherent in democratic processes and is analogous to popular elections. The invalidity of this analogy was conclusively demonstrated by a former Regional Attorney for the National Labor Relations Board (George Rose, "Labor Relations; Minority Rights v. Majority Rule," 37 A. B. A. Jour. (March, 1951), pp. 195-197) when he stated:

"In order to give dignity to this agency and to justify its assumption of other powers than those of representation, an analogy has been drawn between the position of the union and that of a government. This is fallacious and unwarranted, since the function of the union is not to govern but to represent the employees in negotiating an agreement which will set forth their employment relations, and is not to create a social order. This representative is chosen by an electorate which is not based on citizenship or any comparable status, but on the present holding of a

job in that particular employer, plant, craft or lesser unit. Because of the turnover in employment due to industrial factors and to the employee's personal circumstances, the composition of this unit or electorate is constantly changing. For the representative or agent to be able to force the discharge of the employee for seeking a change in representation or for nonmembership in the union, would be equivalent to the dominant political party depriving a man of his citizenship and the right to vote because he does not favor that party. An exercise of power in such fashion is obviously a totalitarian device, and is completely destructive of democratic rights. This danger is noted by the Board, although it overlooks the probability of the union alone resorting to such measures to insure its continuation in power."

Conclusion.

For the reasons stated, it is respectfully submitted that the decree of the Court below should be reversed and the petition for enforcement of the National Labor Relations Board should be dismissed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own chosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * * * *

Representatives and Elections.

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in

respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declined to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing

that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES.

Section 10. * * *.

* * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restrain-

ing order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be

modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * * * * *